Ahmad Azam bin Mohamad Salleh & Ors v Jabatan Pembangunan Koperasi Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO RI–25–77 OF 2002

RAUS SHARIF J

30 APRIL 2004

Administrative Law — Exercise of administrative powers — Decision or order — Registrar-General of Cooperatives Registrar ordered inspection to be conducted against cooperative and issued direction to remedy defects — Whether decision reviewable — Right to be heard — Whether to be accorded before decision made — Whether notice of findings to be given

The applicants are members and shareholders of Koperasi Serbausaha Makmur Bhd ('the third respondent'). The Registrar-General of Cooperatives ('the second respondent') received several complaints in relation to the transactions and workings of the third respondent. Accordingly, the second respondent authorised four officers in the first respondent's department to conduct an inspection against the third respondent. The inspection was conducted and a report was produced.

Based on the report on 6 December 2001, the second respondent issued a direction by way of letter to the third respondent to remedy the defects disclosed as a result of the inspection. Further, the applicants' share investment was disputed by other members. The dispute was referred to the Cooperative Tribunal. Before the tribunal, based on the result of the inspection and written order of the second respondent, an order was sought by the third respondent to nullify the share order investment which was previously approved by the third respondent.

The applicants applied under O 53 of the Rules of the High Court 1980 ('RHC') for an order for certiorari to quash 'the result of inspection' of the first respondent and the written direction of the second respondent on the premise that they were not given the right to be heard before the findings and direction were made by the second respondent and, that they were not given notice of the findings made by the second respondent.

The main issue in this application is whether or not 'the result of the inspection and written order' of the second respondent was reviewable by way of judicial review.

Held, dismissing the application with costs:

(1) In dealing with matters relating to the exercise of discretion by a public body, the power of the High Court to interfere in each case is not as an appellate authority to override a decision of the local authority but as a judicial authority to see whether the local authority had contravened the law (see para 7).

(2) The content of the letter issued on 6 December by the second respondent to the third respondent pursuant to s 67 of the Cooperative Societies Act 1993 ('the Act') was not reviewable under O 53 RHC because the first respondent conducted the inspection on the third respondent on the direction of the second respondent which was merely exercising a function under s 64 of the Act. To hold such process of inspection reviewable would open up the investigation process of all enforcement agencies to constant judicial review (see para 12).

(3) The directions of the second respondent to the third respondent was also not reviewable because the second respondent in giving the directions was exercising his statutory function pursuant to s 67 of the Act, as a public body entrusted by Parliament to oversee the workings of registered societies under the Act and to ensure that registered societies were working efficiently and were successfully managed (see para 13).

(4) Under the scheme of the Act, there is no requirement for applicants to be given the right to be heard before the second respondent made his findings and directions to the third respondent. There is also no requirement for the applicants to be given notices on the findings of the second respondent (see para 14).

[Bahasa Malaysia summary

Pemohon-pemohon adalah ahli-ahli dan pemegang-pemegang saham Koperasi Serbausaha Makmur Bhd ('responden ketiga'). Ketua Pendaftar Koperasi ('responden kedua') telah menerima aduan terhadap transaksi and cara kerja responden ketiga. Berikutan itu, responden kedua memberi kuasa kepada empat pegawai daripada jabatan responden pertama untuk membuat pemeriksaan terhadap responden ketiga. Pemeriksaan berkenaan dikendalikan dan seterusnya laporan dikemukakan.

Berdasarkan laporan yang bertarikh 6 Disember 2001, responden kedua mengeluarkan arahan melalui surat kepada responden ketiga untuk meremedikan kecacatan yang dikemukakan oleh laporan tersebut. Seterusnya, pelaburan saham oleh pemohon dipertikaikan oleh ahli-ahli yang lain. Pertikaian tersebut dirujuk kepada Tribunal Koperasi. Di hadapan Tribunal Koperasi, berdasarkan hasil pemeriksaan dan laporan daripada responden kedua, responden ketiga memohon perintah untuk membatalkan perintah pelaburan saham yang terdahulunya telah diluluskan oleh responden ketiga.

Pemohon-pemohon memohon perintah certiorari di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') supaya keputusan pemeriksaan responden pertama serta arahan bertulis responden kedua dibatalkan kerana pemohon tidak diberikan peluang untuk didengar sebelum keputusan dan arahan dikemukakan oleh responden kedua, dan kerana pemohon tidak diberikan notis tentang keputusan yang dikemukakan oleh responden kedua.

Isu utama di dalam permohonan ini adalah sama ada, keputusan pemeriksaan dan perintah bertulis responden kedua boleh disemak semula melalui semakan kehakiman.

Diputuskan, menolak permohonan dengan kos;

(1) Dalam urusan perkara yang berkait dengan budibicara pihak perbadanan awam, kuasa Mahkamah Tinggi untuk campur tangan bukanlah sebagai mahkamah rayuan yang mempunyai kuasa untuk menolak keputusan pihak berkuasa, tetapi sebagai badan kehakiman untuk melihat sama ada undang-undang dilanggar oleh pihak berkuasa tempatan (lihat perenggan 7).

(2) Kandungan surat yang dikeluarkan pada 6 Disember 2001 oleh responden kedua kepada responden ketiga menurut s 67 Akta Pertubuhan Koperasi 1993 ('Akta itu') tidak boleh disemak di bawah A 53 KMT 1980 kerana responden pertama menjalankan pemeriksaan ke atas responden ketiga di atas arahan responden kedua yang merupakan fungsi di bawah s 64 Akta itu. Jikalau proses pemeriksaan tersebut boleh disemak semula ini akan membolehkan semakan kehakiman sering berlaku ke atas proses pemeriksaan semua agensi penguatkuasa (lihat perenggan 12).

(3) Arahan dari responden kedua kepada responden ketiga tidak boleh disemak semula kerana semasa responden kedua memberi arahan, beliau melaksanakan fungsi undang-undang beliau di bawah s 67 Akta itu sebagai badan awam yang diamanahkan oleh Parlimen untuk menyelia cara kerja pertubuhan yang didaftarkan di bawah Akta tersebut dan memastikan bahawa pertubuhan yang didaftar bekerja dengan cekap dan diurus dengan betul (lihat perenggan 13).

(4) Di bawah skim Akta berkenaan, tiada keperluan untuk pemohon-pemohon diberikan peluang untuk didengar sebelum responden kedua membuat keputusan serta arahan beliau kepada responden ketiga. Juga tiada keperluan untuk pemohon diberi notis berkenaan keputusan responden kedua (lihat perenggan 14) .]

Notes

For cases on exercise of administrative powers, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) para 8.
For application for certiorari, see 9 *Halsbury's Laws of Malaysia*, para [160.113].

Cases referred to:

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417 (refd)
Mohd Yusof bin Mohamed v Kerajaan Malaysia & Anor [1999] 5 MLJ 286 (refd)

Legislation referred to:

Cooperative Societies Act 1993 ss 64, 66, 67
Rules of the High Court 1980 O 53

Jacob Goldie (Jacob Goldie & Toh) for the applicants.
Suzana Atan (AG's Chambers) for the first and second respondents.

Dato' Mohd Arif Mahinder (Sahadin with him) (Sahadin & Co) for the third respondent.

Raus Sharif J:

[1] This is an application by the applicants under O 53 of the Rules of the High Court 1980, for an order of certiorari to quash 'the result of inspection' of the Jabatan Koperasi Malaysia ('the first respondent') and the written direction of the Ketua Pendaftar Koperasi for Malaysia ('the second respondent') as contained in a letter dated 6 December 2001 ('the 6 December letter') addressed to Koperasi Serbausaha Makmur Bhd ('the third respondent').

[2] The applicants are members and shareholders of the third respondent. However, the applicants' shares investment with the third respondent was disputed by other members. The dispute was referred to the Cooperative Tribunal ('the Tribunal') established under the Cooperative Societies Act 1993 ('the Act'). Before the Tribunal, the third respondent sought, *inter alia*, an order that the shares investment of the applicants herein, which has been approved by the Board of the third respondent dated 27 April 1998, be nullified.

[3] In the proceeding before the Tribunal, the third respondent had produced the 6 December letter from the second defendant as evidence to support its case against the applicants. The applicants are not happy with the content of the 6 December letter and hence this application.

[4] Basically, the applicants are seeking this court to review and quash the result of the inspection of the first respondent and the written order of the second respondent as contained in the 6 December letter which was issued by the second respondent pursuant to s 67 of the Act.

[5] The Registrar-General of Cooperatives, En Mohd Yusof bin Shamsuddin, in his affidavit in reply on behalf of the first and second respondents explained as to the circumstances which led to the sending of the 6 December letter to the third respondent. According to him, he received several complaints in regard to the transactions and workings of the third respondent. Accordingly, he had authorized four officers in first respondent's department to conduct an inspection concerning the transactions and workings of the third respondent in accordance with s 64 of the Act. The inspection was conducted from 19September 2001 until 30 September 2001 and thereupon the four officers prepared a report.

[6] According to En Mohd Yusof bin Shamsuddin, there is a discretion on his part under s 66 of the Act to hold an inquiry arising from the said report. However, according to him, having satisfied himself that no further inquiry under s 66 was required to assist in making his finding under s 67 of the Act, he had proceeded to issue his directions as in para four of the 6December letter to the third defendant. Paragraph four of the 6 December letter reads as follows:

> 4 Berdasarkan hasil pemeriksaan tersebut Lembaga Koperasi hendaklah mematuhi arahan-arahan yang berikut yang dibuat di bawah seksyen 67 Akta:-

4.1 Status Skim Pengkorporatan Termasuklah Kemajuan Yang Dicapai Dan Masalah Yang Dihadapi:

4.1.1 Lembaga hendaklah sentiasa berhemah dan bertekun sebagai ahli perniagaan dan hendaklah menjalankan kewajipan sejajar dengan seksyen 44 Akta dan undang-undang kecil 46(1) dan 46(2). Dalam hal ini Lembaga sepatutnya telah megadakan majlis taklimat mengenai isu pengkorporatan sebagaimana yang diputuskan dalam mesyuarat agung tahunan pada 29.6.1997. Ini juga adalah sejajar dengan undang-undang kecil 42(3)(a) KOSMA. Perkara seperti ini hendaklah diberi perhatian pada masa hadapan.

4.1.2 Lembaga hendaklah merujuk semula kepada Jawatankuasa Pelaburan Asing (FIC) di atas kegagalan pihak koperasi mematuhi syarat-syarat yang ditetapkan olehnya berhubung dengan skim pengkorporatan ini.

4.1.3 Lembaga hendaklah memastikan bahawa bagi sesuatu mesyuarat agung dikeluarkan kepada anggota-anggota menurut undang-undang kecil 27(2) KOSMA untuk mengelakkan daripada timbulnya isu pertikaian kesasihan mesyuarat agung. Notis mesyuarat agung juga hendaklah diberi kepada Ketua Pendaftar dalam masa tidak kurang daripada 30 hari sebelum diadakan mesyuarat agung mengikut undang-undang kecil 27(3). Selain daripada itu aturan tetap mesyuarat agung KOSMA juga hendaklah dipatuhi dalam mengendalikan mesyuarat. Sekiranya sesuatu aturan itu tidak lagi sesuai digunakan, Lembaga perlu menelitinya dan membuat pindaan yang sewajarnya untuk mendapat kelulusan daripada anggota-anggota dalam mesyuarat agung.

4.1.4 Lembaga hendaklah menyerahkan kepada Ketua Pendaftar minit-minit segala mesyuarat agung dan mesyuarat Lembaga tidak lewat daripada 30 hari selepas tarikh mesyuarat-mesyuarat itu sejajar dengan kehendak seksyen 14(b) Akta untuk mengelak daripada dikenakan tindakan kompaun atau pendakwaan.

4.1.5 Lembaga sepatutnya mendengar nasihat Pendaftar Koperasi Negeri Pahang supaya menyedia dan membentangkan kertas kerja berkaitan pembatalan pengkorporatan KOSMA dalam mesyuarat agung khas pada 18.8.2001 sebagaimana yang diputuskan juga dalam mesyuarat Lembaga pada 21.7.2001. Tanpa pembentangan kertas kerja yang jelas dan terperinci mengenai cadangan pembatalan skim pengkorporatan tersebut anggota-anggota tidak mendapat penerangan dan maklumat yang sebenar dan mungkin akan membuat keputusan yang tidak tepat yang boleh menjejaskan kedudukan koperasi. Nasihat yang diberikan itu adalah selari dengan fungsi-fungsi Ketua Pendaftar yang ditetapkan di bawah seksyen 3(3) Akta. Perkara seperti ini perlu diberi perhatian oleh Lembaga pada masa hadapan.

4.1.6 Pada masa yang akan datang Lembaga hendaklah lebih telus dan perlu membentangkan secara terperinci kos-kos yang terlibat serta implikasi ke atas kedudukan kewangan koperasi apabila merancang untuk menjalankan sesuatu aktiviti/perkara yang penting seperti isu pengkorporatan supaya anggota-anggota benar-benar faham dan sanggup menanggung risikonya. Ini juga akan mengelak koperasi daripada mengalami kerugian yang sia-sia.

4.1.7 Lembaga hendaklah menyemak dan membetulkan rekod-rekod berkenaan dengan pelaburan KOSMA dan syer KCB, KPB dan KNB supaya selaras dengan maklumat yang difailkan kepada Pendaftar Syarikat. Maklumat pemegang syer KCB yang difailkan dengan Pendaftar Syarikat juga hendaklah disemak semula untuk menentukan punca perbezaan jumlah syer sebanyak RM46,614,002.00 itu dan membuat pelarasan yang sewajarnya. Lembaga juga hendaklah berurusan dengan pihak KOSMA Tourism Sdn Bhd dan pihak KCB untuk memastikan syer kepunyaan KOSMA dalam KOSMA Tourism Sdn Bhd sebanyak RM1.4 juta itu dipindahmilik kepadanya memandangkan pemegang syer tersebut masih lagi KCB mengikut rekod Pendaftar Syarikat. Lembaga juga hendaklah menyemak syer KOSMA dalam Kilang Kosfarm Sdn. Bhd. yang berjumlah RM2,345,069.00 memandangkan rekod Pendaftar Syarikat hanya menunjukkan jumlah RM2 juta. Perbezaan tersebut perlu ditentukan dan diselaraskan oleh KOSMA dengan pihak-pihak berkenaan.

4.1.8 Lembaga hendaklah mengkaji secara teliti kesan skim pengkorporatan tersebut dari semua aspek supaya ianya tidak merugikan koperasi dan sebarang keputusan yang akan diambil hendaklah mengikut hasrat asal yang diputuskan oleh KOSMA sendiri seperti dinyatakan dalam surat-surat permohonan KOSMA kepada pihak FIC, Jabatan Pembangunan Koperasi dan sebagainya serta mematuhi syarat-syarat yang telah ditetapkan oleh FIC dalam surat-surat kelulusannya. Lembaga perlu memastikan bahawa sebarang skim pengkoporatan hendaklah memberi manfaat kepada KOSMA dan anggota-anggota dan bukannya sebaliknya.

4.2 Status Semasa Kewangan Koperasi

4.2.1 Lembaga hendaklah mengambil tindakan untuk mengaudit semula akaun KOSMA bagi tahun kewangan berakhir 31.12.1998 dan akaun-akaun bagi tahun yang berikutnya memandangkan akaun tersebut telah ditolak oleh anggota-anggota dalam mesyuarat agung tahunan ke 19 pada 12.9.1999. Lagipun KOSMA tidak sepatutnya mengalami kerugian akibat pengkorporatan tersebut. Pengauditan semula ini juga adalah penting untuk memastikan sama ada penyata-penyata kewangan bagi tahun 1998 yang diaudit sebelum ini memberi gambaran yang benar dan saksama tentang transaksi-transaksi kewangan dan kedudukan hal-ehwal koperasi.

4.2.2 Lembaga hendaklah memastikan KOSMA menjalankan sesuatu aktiviti yang boleh memanfaat anggota-anggota sejajar dengan undang-undang kecil 8(1) untuk menjamin ia mempunyai pendapatan yang tetap dan mengelakkan kedudukan kewangan daripada menjadi lebih teruk.

4.3 Pelaburan Syer Oleh Enam Orang Anggota Koperasi

4.3.1 Lembaga hendaklah lebih bertanggungjawab dan telus dalam menjalankan tugas yang ditetapkan. Isu-isu seperti pembatalan had maksimum pelaburan syer dalam KOSMA bagi membolehkan anggota menambahkan pelaburan mereka dan pembekuan pertambahan syer KOSMA bukan sahaja patut dimaklumkan kepada semua anggota melalui surat pekeliling tetapi wajar disiarkan dalam media massa termasuk akhbar-akhbar tempatan. Ini juga

akan mengelak anggota-anggota daripada membuat sebarang tuduhan terhadap anggota Lembaga. Perkara ini hendaklah diberi perhatian pada masa hadapan.

4.3.2 Perbincangan mengenai permohonan menjadi anggota koperasi dan perolehan, penambahan, pengurangan, memindah milik syer atau unit lading daripada anggota juga hendaklah dibincangkan dalam mesyuarat Lembaga di bawah agenda khusus sejajar dengan undang-undang kecil 42(3)(d) dan (f) bukannya dibuat di bawah agenda hal-hal lain seperti dilakukan dalam mesyuarat Lembaga pada 27.4.1998. Perkara ini perlu diberi perhatian pada masa hadapan.

4.3.3 Permohonan untuk menjadi anggota KOSMA hendaklah dibuat dalam borang rasmi koperasi dan dialamatkan kepada Setiausaha selaras dengan undang-undang kecil 11 dan kelayakan menjadi anggota hendaklah mengikut undang-undang kecil 10. Tiap-tiap permohonan menjadi anggota hendaklah disertakan dengan fee masuk sebanyak RM10. Lembaga hendaklah memastikan bahawa prosedur ini dipatuhi oleh semua bakal anggota dan dokumen-dokumen berkenaan hendaklah disimpan dengan teratur untuk membolehkan semakan dibuat pada bila-bila masa.

4.3.4 Lembaga hendaklah membuat laporan polis kerana pemeriksaan mendapati seolah-olah wujudnya suatu konspirasi yang terancang dan perilaku 'malafide' bagi memperolehi kesemua asset KOSMA dan seterusnya menguasai keseluruhan pegangan syer dalam KCB, KPB dan KNB oleh pihak-pihak yang terlibat.

[7] Thus, the central issue in this application is whether or not 'the result of the inspection and written order' of the second respondent is reviewable by way of judicial review. It is trite law that in dealing with matters relating to the exercise of discretion by a public body, the power of the High Court to interfere in each case is not as an appellate authority to override a decision of the local authority but as a judicial authority to see whether the local authority had contravened the law. (See *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417; *Mohd Yusof bin Mohamed v Kerajaan Malaysia & Anor* [1999] 5 MLJ 286.

[8] As stated earlier in the present application, the applicants are seeking from this court, firstly to quash the result of the inspection of the four officers authorized by the second respondent and secondly to quash the findings and directions of the second respondent to the third respondent.

[9] The power of the four officers to inspect books, etc of registered societies is derived from s 64 of the Act which reads:

> The Registrar-General, or any public officer authorized by him generally or specially in writing, shall have access to all books, accounts, documents and securities of a registered society and its subsidiary or subsidiaries, if any, and shall be entitled to inspect the cash in hand; and every officer (including any past officer) of the registered society and its subsidiary or subsidiaries, if any, shall furnish such information and produce such books, accounts, documents and securities in regard to the transactions and working of the registered society and its subsidiary or subsidiaries, if any, as the person making such inspection may require.

[10] The requirement of the Registrar-General to communicate to the registered society the result of the inspection carried out under s 64 and to make orders in writing, directing any officer of a registered society to take such action as may be determined in order to remedy the defects disclosed from the inspection is provided by s 67. Section 67 reads as follows:

> If an inspection is carried out under section 64 or an inquiry is held under section 66, the Registrar-General may communicate the result of the inspection or the inquiry to the registered society and may, by order in writing, direct any officer of the registered society to take such actions as may be determined in the order to remedy, within such time as may be specified therein, the defects, if any, disclosed as a result of the inspection or the inquiry.

[11] That was what the second respondent did when he issued the 6 December letter. The letter was issued pursuant to s 67 of the Act. In the letter, the second respondent was in fact communicating the result of the inspection to the third respondent (para 3 of the letter) as well as giving his directions (para 4 of the letter) to the third respondent to take such actions to remedy the defects disclosed as the result of the inspection.

[12] Thus, I am of the view that the content of the 6 December letter issued by the second respondent to the third respondent pursuant to s 67 of the Act, is not reviewable under O 53 of the Rules of the High Court 1980. To me, the four officers from the department of the first respondent when conducting the inspection on the third respondent, on the direction of the second respondent, were merely exercising a function under the Act. To hold such process of inspection reviewable, would open up the investigation process of all enforcement agencies to constant judicial review. I have no valid reason to open the floodgate.

[13] Similarly, I am also of the view that the directions of the second respondent as in para 4 of the 6 December letter, to the third respondent is also not reviewable. To me, the second respondent in giving the directions was exercising his statutory function as a public body entrusted by Parliament to oversee the workings of registered societies under the Act and to ensure that registered societies are working efficiently and successfully managed.

[14] The applicants' complaints in this case are, (i) that they were not being given the right to be heard before the findings and directions were made by the second respondent and, (ii) that they were not given notice of the findings made by the second respondent. With respect, I find that, under the scheme of the Act, there is no requirement for the applicants to be given the right to be heard before the second respondent made his findings and directions to the third respondent. There is also no requirement for the applicants to be given notices on the findings of the second respondent. It would be absurd to impose a duty on the second respondent to give notice of his findings and to give every member of the third respondent an opportunity to be heard before making his findings and directions to the third respondent.

[15] For the aforesaid reasons, the applicants' application is dismissed with costs.

Application dismissed with costs.

Reported by Jeyanthi Mala